IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 562

United States of America,

Petitioner,

vs.

Harry J. Madigan,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR HARRY J. MADIGAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 85 Fed. (2d) 609.

QUESTION PRESENTED.

Whether a veteran, totally and permanently disabled, who prior to his total permanent disability, has had two contracts of insurance with the United States ((1) a term contract; (2) a policy of United States life insurance) and who upon becoming totally and permanently disabled had due and uncollected compensation, which compensation was due and uncollected on the date he ceased to pay premiums on each contract of insurance, may elect to make claim and bring suit on the prior contract, and if found entitled to benefits thereunder, upon surrender of the subsequent contract, receive payments under the prior contract.

STATUTES INVOLVED.

Section 305 of the World War Veterans' Act, 1924, as amended July 2, 1926, c. 723, 44 Stat. 799, 800 (U. S. C., Title 38, Sec. 516), provides, so far as pertinent, as follows:

> "Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insur-

ance Act as amended December 24, 1919, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the United States Veterans' Bureau is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law: * * *"

Section 307 of the World War Veterans' Act, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 1001, 1002 (U. S. C., Title 38, Sec. 518) provides as follows:

"All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of insurance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: Provided, That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: Provided further, That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance."

ARGUMENT.

There is presented in this case, no question which has not been presented to the Circuit Courts of Appeals and on which these circuit courts are not agreed. It has been maintained by the representatives of the Veterans Administration that before the provisions of section 305, *supra,* may be invoked there must be a lapsation of the insurance contract. The courts have uniformly held against this contention. The courts are agreed that when an insured veteran ceases to pay premiums on his contract of war risk insurance at a time he is entitled to compensation, and if that compensation remains uncollected on the date of total permanent disability, the insurance contract does not lapse and revive but remains in force. (See *United States v. Woolen* (C. C. A. 6th), 25 Fed. (2d) 673,679. *United States v. Hendrickson,* 53 Fed. (2d) 797, 799 (C. C. A. 10th). *United States v. Sellers,* 75 Fed. (2d) 623,625 (C. C. A. 5th), certiorari denied, 295 U. S. 763.) Here, it is admitted, that, on November 1, 1919, the insured was suffering from a compensable disability. That on this date he was less than totally and permanently disabled. That the compensation due on November 1, 1919, remained uncollected until a date subsequent to the date of total permanent disability. The one reason advanced as a defense to a right to recover on the original contract of insurance, is a subsequent transaction between the insured and the government, and because insured paid premiums on a converted policy of insurance for the months of November and December, 1919.

The question presented to the trial court and to the Circuit Court of Appeals in this case was an interpretation of section 307, as amended by the Act of July 3, 1930, *supra.* This section of the law has been many

times interpreted by the Circuit Courts of Appeal. (See *United States v. Stamey*, 48 Fed. (2d) 150, 152 (C. C. A. 9th), and *Herrig v. United States*, 53 Fed. (2d) 327, 328 (C. C. A. 9th). *Sprencel v. United States*, 47 Fed. (2d) 501, 504 (C. C. A. 5th). *United States v. Arzner*, 57 Fed. (2d) 488, 490 (C. C. A. 9th).) The Circuit Courts are agreed that section 307 allows an action on an original contract of insurance unembarrassed by subsequent transactions with the government on any subsequent contract. That a subsequent contract may be completely ignored. The trial court and the Circuit Court of Appeals in this case merely followed the rule laid down in *United States v. Arzner, supra,* which opinion was affirmed by this court in *United States v. Arzner*, 287 U. S. 470.

The ground upon which the decision of the Circuit Court in this case is based, appears clearly in the opinion. On page 611 of the opinion the court said: "We think the decision of the court in *United States v. Arzner*, 57 Fed. (2d) 488, 489, is decisive;" and on page 612 of the opinion below it is said: "The above quoted case (*United States v. Arzner*) sets at rest the contentions of the government and is determinative of this appeal."

The purpose of Congress in enacting the amendment of July 3, 1930, to section 307 was to prevent a veteran from being penalized because he attempted to pay premiums and carry his insurance. Here, because premiums were paid for the months of November and December, 1919, on a policy too large for the insured to carry, it is contended, insured has lost his rights on his prior and cheaper insurance, notwithstanding the intention of Congress that a veteran should not be so penalized.

CONCLUSION.

The case was correctly decided below, and the petition for certiorari should be denied.

Respectfully submitted,

DAVID SPAULDING,

Attorney for Respondent.